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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 1982

JOSEPH WILSON, JR.
PETITIONER

V.

WALTER D. ZANT, SUPT.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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INDEX

Page

OPINION BELOW. 1

JURISDICTION 1-2

QUESTIONS PRESENTED. 2

CONSTITUTIONAL PROVISIONS INVOKED. 2

STATEMENT OF THE CASE 3-4

REASONS FOR GRANTING THE WRIT 4

1. The introduction at Petitioner's Trial of statements made to police during custodial interrogation, after he had requested an attorney, but before one was provided, violates the Fifth and Fourteenth amendments to the United States Constitution.....4-8

2. The third party and tangential evidence discovered and introduced in Petitioner's trial as a result of Petitioner's inadmissible statement must be excluded under the Fifth amendment.....8-9

APPENDIX:

1. Opinion and Judgment of the Supreme Court of Georgia . . . . . .App. A

2. Order Extending Time to File Petition for Writ of Certiorari . . . . . .App. B

3. Order of the Supreme Court of Georgia staying its remittitur. . . . . App. C

4. Unpublished opinion of the Superior Court of Butts County, Georgia, in Petitioner's state Habeas petition. . App. D

CITATIONS

Page

Chapman v. California
386 U. S. 18 (1967) 7

Edwards v. Arizona,
451 U. S. 477 (1981) 4,6,8

Fare v. Michael C.
442 U. S. 707 (1979) 8

Harrison v. United States
392 U. S. 219 (1968) 7

Michigan v. Mosley
423 U. S. 96 (1975) 6

Michigan v. Tucker
417 U. S. 433 (1974) 9

Milton v. Wainwright
407 U. S. 371 (1972) 7

Miranda v. Arizona
384 U. S. 436 (1966) 5,6,9

United States v. Downing
665 F2d 404 (1st Cir. 1981) 9

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The Petitioner, Joseph Wilson, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on April 21, 1982.

OPINION BELOW

The opinion of the Supreme Court of Georgia in this proceeding (Appendix A, infra, p.____) is reported as Wilson v. Zant, 249 Ga. 373 (290 SE2d 442) (1982). The opinion of the Supreme Court of Georgia in Petitioner's direct appeal is reported as Wilson v. State, 246 Ga. 62 (268 SE2d 895) (1980), cert. denied, 449 U. S. 1103.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 21, 1982, affirming Petitioner's conviction of murder, kidnapping with bodily injury and his sentence of death. A timely petition for rehearing was denied on May 17, 1982. An order extending time to file this petition was granted on

July 16, 1982 (Appendix B. infra, p. ____). The Supreme Court of Georgia has entered an order staying the remittitor of the judgment in this case pending ruling on this Petition. (Appendix C, infra, p.____). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the introduction at Petitioner's Trial of statements made to police during custodial interrogation, after he had requested an attorney, but before one was provided, violates the Fifth and Fourteenth amendments to the United States Constitution.
2. Whether the third party and tangential evidence discovered and introduced in Petitioner's trial as a result of Petitioner's inadmissible statement must be excluded under the Fifth amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution, which provides; inter alia:

> No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law...

2. The Fourteenth Amendment, United States Constitution, which provides, inter alia:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction to equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was tried and convicted of murder, kidnapping with bodily injury and possession of a firearm during the commission of a felony, in Forsyth County, Georgia, on August 16, 1979, and was thereafter sentended to death.

The facts necessary to place in their setting the questions now raised, as adopted by the Supreme Court of Georgia (290SE2d at 445) are as follows:

The Petitioner was arrested at his home at approximately 6:30 a.m. on February 27, 1979, read his Miranda rights, and transported to the Forsyth County Sheriff's Department where he was held in the "drunk tank" until approximately 8:00 a.m. Petitioner was then removed from the "drunk tank" and questioned by Sergeant J. C. Adams. At trial, Sergeant Adams acknowledged that at some point between arrest and interrogation Petitioner requested an attorney. However, an attorney was not provided, and after further Miranda warnings and signing a written Miranda acknowledgement and waiver form, Petitioner gave a statement to the authorities.

In this statement, Petitioner denied committing the crimes and claimed alibi, stating he had been at home with his family at the time the victim was killed. Under further questioning, Petitioner denied owning a shotgun and stated that the only gun he owned was a toy "tin-can alley" gun which he had given his children. He admitted that he drove a truck similar to one previously described by police interviewees, and informed the police that the truck was owned by his business partner, David Shaffer. The police then interviewed Shaffer, obtained pictures of the truck, and a statement from Shaffer that Petitioner had bought a shotgun from one Joseph Evankovech.

At trial, during the state's case-in-chief, various witnesses for the State related to the jury most of Petitioner's statement. The State also introduced the toy gun to show it could not have been the gun seen by the witnesses. Further, the State elicited direct testimony from Shaffer and Evankovich about the truck and shotgun, and introduced photographs of the truck.

Further facts may be related as necessary.

REASONS FOR GRANTING THE WRIT

1. The use of Petitioner's statement against him at his trial violated his right under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation after invoking this right.

Petitioner contends that the introduction of the statement he gave to police during custodial interrogation after he had requested an attorney but before one was provided violates his Fifth and Fourteenth amendment rights as defined by this Court in Edwards v. Arizona, 451 U. S. 477 (1981).

The habeas court found, as a matter of fact, that Petitioner had properly invoked his right to counsel, that the police had subsequently initiated custodial interrogation before counsel was present and, therefore, concluded that the resulting statement should not have been admitted at Petitioner's trial, relying on Edwards v. Arizona, supra.(decided after Petitioner's trial). (Appendix D, infra.)

The Supreme Court of Georgia agreed, and held:

> " ...We therefore find that the defendant's statement, given pursuant to police initiated custodial interrogation after the defendant had invoked his right to counsel, was inadmissible at trial during the state's case-in-chief."
>
> 290SE2d at 446

However, both the habeas court and the Supreme Court of Georgia went on to hold that since the statement was not a confession, its erroneous admission was harmless beyond a reasonable doubt. Id., at 446, 447.

(A) The Miranda rationale applies to the instant statement.

This Court specifically spoke to this issue in the Miranda opinion itself:

> "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by Defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement..."
>
> Miranda v. Arizona, 384 US 436, 476-77 (1966).

This is precisely the situation in Petitioner's case.

There is no doubt that Edwards is a reaffirmation of the Miranda principles. Indeed, the Court took specific pains to note that its opinion was intended to

> "...reconfirm these views and to lend them substance, [and] emphasize that it is

inconsistent with Miranda and its progeny for the authorities, at their instance, to re-interrogate an accused in custody if he has clearly asserted his right to counsel."

Edwards v. Arizona, 477 US at ____.

(b) Edwards established a per se rule.

Beyond reiterating the standard of knowing and intelligent waiver, this Court in Edwards added an "additional safeguard" to ensure that the right to counsel, once exercised, is effectuated: when an accused has invoked his right to have counsel, he is not subject to further interrogation by authorities until counsel is provided, unless the suspect initiates the dialogue. Only by the use of such an objective guideline can a suspect's rights during custodial interrogation be protected. The Edwards majority specifically mandates that it be the suspect who initiates any subsequent interrogation, thus any finding of a valid waiver must include the "necessary fact that the accused, not the policy, reopened the dialogue with the authorities." (emphasis added)

Moreover, the Court specifically distinguished Michigan v. Mosley, 423 US 96 (1975) - which had rejected a per se rule in the right to silence context - by reaffirming a stronger standard in the right to counsel cases.

That a per se rule was indeed intended was accepted by the Supreme Court of Georgia in its opinion below. 290SE2d at 446.

(c) Violation of a per se constitutional rule cannot be harmless; and is not harmless in Petitioner's case.

As a general rule, a per se rule establishes clear guidelines for lower courts to follow: From a threshold question of fact flows a conclusion of law; as opposed to a case-by-case approach which fails to generate any meaningful precedent. Further, a per se rule precludes after-the-fact subjective inquiry and ensures that a suspect's decision to speak is "truly the product

of free choice." Miranda v. Arizona, 384 US at 457.

Thus, once an error of constitutional magnatude is found, the Courts have addressed the question of whether the error was harmful.

In effecting an approach to the determination of the harmfulness of a "substantial" constitutional error, this Court has noted that an error which "possibly influenced" the jury adversely to a defendant "cannot... be conceived of as harmless." Chapman v. California, 386 US 18 (1967).

An appellate court, when faced with a violation of a per se rule affecting such a "substantial" right as the right to counsel, should focus on the nature of the constitutional error - as opposed to what can be denominated as the "overwhelming evidence" test, i.e. once evidence erroneously admitted is excluded, there remains overwhelming evidence of guilt. See, Milton v. Wainwright, 407 US 371 (1972).

An approach which focuses on the other evidence in the case usurps the very integrity of the rule itself; as the right protected sub judice is so important that it can only be protected by objective indicia of compliance. Further, such an approach usurps the jury's function far more significantly than a limited inquiry into an examination of the error itself. Finally, such a test is inconsistent with the notion that all accused individuals, both guilty and innocent, are entitled to a fair trial and to all the protections of the Constitution.

The admission of Petitioner's statements was harmful in its use to imply guilt by attempting to show untruths contained therein; and impelled the defendant to take the stand. See, Harrison v. United States, 392 US 219 (1968). The statement lead to the discovery and admission of numerous other physical items as well as witnesses for the state.

Because Petitioner's conviction and sentence to death is based, in large part, on the introduction of his uncounseled

custodial statement taped in violation of Edwards v. Arizona, the conviction and sentence must be set aside.

2. The third party and tangential evidence discovered as a result of Petitioner's inadmissible statement must be excluded under the Fifth Amendment exclusionary rule.

In its opinion below, the Supreme Court of Georgia denominated the Edwards ruling to be "an application of the prophylactic rules of Miranda." 290SE2d at 447. Thus, while the "fruit" of a constitutional right itself must be suppressed; the fruit of a violation of a prophylactic rule is not automatically subject to the exclusionary rule. 290SE2d at 447. The Supreme Court of Georgia, based on this logic, then held "that the exclusionary rule does not apply to evidence derived from a voluntary statement obtained in violation of Edwards v. Arizona...". 290 SE2d at 448.

(a) Edwards protects the right to counsel.

As noted by the Court in Edwards, "an accused's request for an attorney is per se an invocation of his Fifth Amendment rights..." citing Fare v. Michael C.,442 US 707, 719 (1979). Edwards reaffirmed the right protected by Miranda, that being the "Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation."

The instant case does not include the question of whether Petitioner was advised of his rights pursuant to Miranda, but whether his right to counsel was violated.

The Edwards case clearly espoused protection of the right, not an application of the Miranda rules

(B) The exclusionary rule applies to evidence derived in violation of the right to counsel.

The First Circuit Court of Appeals specifically addressed this question in United States v. Downing, 665F2d 404 (1st Cir. 1981). In Downing, as in the opinion below, the government relied on Michigan v. Tucker, 417 US 433, in which a failure to advise a suspect of his right to counsel did not require exclusion of evidence obtained as a result of the accused's response to police questioning. However, as the Downing court notes "Tucker is clearly not controlling," as "The Court explicitly declined to determine the scope of the Fifth Amendment exclusionary rule when, as here, the interrogation occurred after the Miranda decision." Id., at 407 (emphasis in original). The Downing court cut right to the gravamen of the issue by noting that Tucker itself distinguished between a violation of the Fifth Amendment right itself and a violation of "The prophylactic rules developed to protect that right." Id., at 408. In Tucker the court held that in leaving out one of the Miranda warnings, the police conduct was not unconstitutional but only a disregard of the procedural rules later developed in Miranda.

By contrast, in Petitioner's case - as in Downing - there was an explicit request for the presence of counsel. Thus, while Miranda and Tucker "may have provided flexibility to police in administering the safeguards, it provided no similar leeway for police to ignore a suspect's rights to have counsel present once that right has been asserted." Downing, supra, at 408.

After further analysis, the Downing court held that

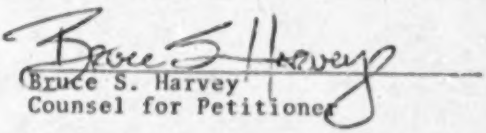
> any evidence obtained as a result of violating [Petitioner's] Fifth Amendment right to have counsel present during custodial interrogation cannot be introduced against him at trial.

The analysis of the Downing court is clearly correct. Thus, the opinion of the Supreme Court of Georgia is erroneous and must be reversed.

CONCLUSION

The judgment below is a departure from the recent unambiguous decisions of this Court which require that convictions based on statements derived from police initiated custodial interrogation after counsel has been requested, but before counsel has been provided, be set aside. As such, it represents a breach in the wall erected by the Fifth Amendment to the Constitution and the decisions of this Court which were designated to protect a citizen from being convicted by his State through use of statements made by him without the aid of counsel. This petition for writ of certiorari should therefore be granted.

Respectfully submitted.



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